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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

## No. 515

RICHARD R. HARSHMAN,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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The Scheffer Press, Inc.—ANdover 3-6850

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*To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:*

Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, (Honorable Julius J. Hoffman, District Judge) which judgment, after a verdict of the jury finding Petitioner guilty of violation of the Universal Military Training and Service Act, (Sec. 462, Title 50, App. U.S.C.), sentenced him into the custody of the Attorney General of the United States for a period of two years and six months and that he forfeit and pay a fine in the sum of One Thousand Five Hundred Dollars and cost of proceedings, and that he stand committed until the fine and costs are paid.

## OPINION BELOW.

The opinion of the Court of Appeals of August 20, 1962, No. 13586, of the September Term, 1961, April session 1962, of that court, is not yet reported. It appears as Appendix A attached to this petition. Since that court ruled that the decision in *United States* v. *Parker*, 13585, controls the decision here, therefore, for the convenience of the court, we reprint the opinion in the *Parker* case similarly as part of Appendix A.

## JURISDICTION.

The judgment and commitment of the trial court was entered on the 26th day of September, 1961 (18 U.S.C. 3231; 62 Stat. 826) the opinion of the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court (28 U.S.C. 1291; 72 Stat. 348). A petition for rehearing was filed within the time set forth by the Rules and this was denied by the United States Court of Appeals on the 14th day of September, 1962. This petition for a Writ of Certiorari is timely filed.

The statutory provision, believed to confer jurisdiction on this Court to review the judgment by a Writ of Certiorari, is 28 U.S.C. 1254 (1); 62 Stat. 928.

## QUESTIONS PRESENTED.

1.

While there are subsidiary questions which the petitioner hopes this Court will decide, there is one main issue and that is: When the local board indicates on the record that the petitioner under the Selective Service Act is sincere and honest in his contention that he objects to combatant as well as to noncombatant service because of his religious training and belief nevertheless,

the local board exempts him only from combatant service and the appeal board does likewise, does the employment of petitioner by a candy factory as a salesman, a small part of the products of which is purchased by the armed forces, present a *basis in fact* for the board's denial of petitioner's full exemption from service?

II.

We read this court's decision in *Dickinson* v. *United States*, 346 U.S. 389; 74 S.Ct. 152, as holding that when a draftee establishes *prima facie* that he is entitled to the exemption claimed, the record must disclose matters "incompatible" with the *prima facie* case, otherwise there is no *basis in fact* for the denial of the classification claimed. Does the holding in the *Dickinson* case apply, as the Court of Appeals for the Seventh Circuit held, only to cases "which involved ministerial status", or does it apply to a conscientious objector as the petitioner is here?

III.

The Local Board here went on record in acknowledging petitioner's sincerity in his claim for full exemption based on religious training and belief.

The Local Board nevertheless refused him 1-O classification because—as one Board Member stated, ". . . I don't believe there is any such thing as a real Conscientious Objector. I believe that any person who lives in America or makes his living in this country should be willing to fight for his country." (Exh. 8) Can such an illegal conduct of the Local Board be overcome by the Appeal Board's classification *de novo* (resulting in the same denial) in face of petitioner's claim of lack of due process?

IV.

When the government is permitted to put into evidence based on gossip, unsupported, mainly hearsay matter, that the employing company sometime, somewhere manufactured some implements of war, but petitioner was prevented by the trial court to present evidence to the contrary, does such evidence presented by the government constitute *basis in fact* to support the Local and Appeal Boards' action denying petitioner's claim for exemption which claim was supported by his evidence *prima facie*?

V.

The government in this case introduced into evidence the Selective Service file of petitioner. The trial court precluded him to question the validity and truthfulness of the content of some of those documents. Was there a prejudicial error in such denial of petitioner's right to examine and offer evidence as to such documents and was it further a prejudicial error when the trial court permitted the jury to take with it the Selective Service file, or was there no prejudice as the Court of Appeals held "since the jury had already heard oral testimony of the substance of its (Selective Service) contents."

VI.

The Selective Service file introduced by the government included the recommendation of the Department of Justice addressed to the Appeal Board. This recommendation referred to the Hearing Officer's report to the Department. Petitioner challenged the truthfulness of the recommendation as far as it referred to the Hearing Officer's report. His request to the Court to order the production of the Hearing Officer's report was denied by the Trial Court. Was this a prejudicial error contrary to the holding of the Court of Appeals?

## STATUTES AND REGULATIONS.

(Because of the length they appear more conveniently in Appendix B hereto attached)

1. 50 U.S.C. 462 (62 Stat. 622)
2. Rule 1622.1 of Selective Service Regulations.
3. Rule 1622.2 of Selective Service Regulations.
4. Rule 1622.11 of Selective Service Regulations.
5. Rule 1622.14 of Selective Service Regulations.
6. Rule 1622.16 of Selective Service Regulations.
7. Rule 1626.25 of Selective Service Regulations.

## STATEMENT OF THE CASE.

Petitioner was indicted for having violated Sec. 462, Title 50, App. U.S.C. (Universal Military Service and Training Act) and was charged with having refused to obey an order of induction issued from his local Selective Service Board 177 in Sullivan, Illinois. He pleaded not guilty and the case was tried before a jury. Evidence was heard and the jury found him guilty as charged and the Trial Court's judgment was that he be committed to the custody of the Attorney General for a period of two years and six months and that he pay a fine of One Thousand and Five Hundred Dollars and the cost of prosecution (pages 72, 73 of the Appendix in the Appeal filed before the United States Court of Appeals for the Seventh Circuit hereinafter referred to as (Ap. pp. 72, 73)). Petitioner appealed from the judgment to the United States Court of Appeals for the Seventh Circuit on various grounds and the Court of Appeals affirmed the judgment of the Trial Court (Appendix A).

In the presence of the jury, government attorneys identified and offered into evidence petitioner's Selective

Service file. To many of these documents petitioner objected, however, the objections were overruled and the file was admitted into evidence (Ap. 11).

The petitioner was identified by government witness as the person who appeared at the Induction Center and that when he was asked to take a step forward indicating his induction into the armed forces he remained perfectly still (Ap. 18).

Upon the government's resting its case petitioner moved for a judgment of acquittal which motion was denied (Ap. 22).

Petitioner in presenting his defense moved for an order upon the government to produce Government Hearing Officer (Brittingham's) second letter to which reference is made in the recommendation of the Department of Justice to the Appeal Board and which was introduced as Exhibit B-18 and B-36. The motion was denied (Ap. 25, 26). Petitioner then moved that the court order the government to produce the hearing officer's report so referred to in Exhibit B-18 and B-36 for perusal by the court *in camera*. Said motion was also denied (Ap. 27).

Petitioner called his Local Draft Board Clerk and the government objected to the questions whether the clerk ever heard any one of the Draft Board members expressing an opinion as set forth in Exhibit B-8, introduced by the government to the fact that the Board member did not believe "that there is any such thing as a real Conscientious Objector" (p. 31); the question whether this clerk heard any draft board member express an opinion to the effect that "any person who lives in America or makes his living in this country should be willing to fight for his country," (p. 3) irrespective of his religious objections to war and whether the Board while the clerk was

so employed, ever gave anybody a classification of 1-O. Objections to questions were sustained (Ap. 28, 29). Petitioner offered into evidence the testimony of Felix Hagerman who is now and was for the past 15 years connected with the Community Industries, Limited, of Sullivan, Illinois which company employs petitioner. This witness was executive vice president and treasurer of the company (Ap. 29-32).

The question whether the witness knows the products manufactured by the company during the past 15 years was objected to by the government, the objection was sustained, and the jury was instructed to disregard the answer (Ap. 33). Witness testified that petitioner is a member in good standing of the Church of Jesus Christ of Sullivan, Illinois and that he knows the tenets of the church, however, the government objects to the question whether or not in accordance with the tenets of the church a member in good standing would ever manufacture ammunition. The objection was sustained (Ap. 33). Petitioner offered proof to effect that if witness Hagerman would have been permitted to answer questions he would have testified that as executive vice president of Community Industries, Ltd., he knows that the Church of Jesus Christ never manufactured anything. All manufacturing was done by the company. The items manufactured were candy, ladies' dresses, tents, garden tractors, snow removing tractors and such things. That to this witness's knowledge the company never manufactured any war goods. That all items manufactured by it were for civilian consumption though some of the candy was bought by the government. That he understands the teachings of the church to which petitioner belongs and that no member in good standing would ever manufacture items which would be used for destructive purposes. That they would not manufacture bullets, machine guns, tanks, etc.

The government objected to the offer of proof and the offer was rejected by the court (Ap. 35-37).

Petitioner testified that he is 26 years of age and that the founder of the Church of Jesus Christ was his great-grandfather and that the present pastor is his great aunt. He is a member of the same church and attends services regularly twice a week. So do his parents and three sisters.

At the time when he registered for the draft at the age of 18 he was working for Community Industries, Ltd. assembling piece goods in the dress factory. While he worked there, there were three items manufactured, namely, cooks' coats, mattr ss covers and a cooling suit made up of several layers of perforated material. At the present time he is employed in the candy division. He was also employed in the garden tool division where they manufactured garden tractors (Ap. 38, 39).

When petitioner went to work in the candy division of the company after school in his senior year in high school, first he worked as a janitor, then he worked feeding choeolate bars into an enrober; then he worked on a machine which puts sugar coating on the candy. After he finished high school he was given a job as a salesman in the candy division. At the time of the trial he was a factory representative and he dealt with brokers who do the direct selling of the candy for the company (Ap. 40). The question whether he ever sold any candy to the armed forces was objected to by the government and the objection was sustained (Ap. 40).

He completed the necessary Selective Service forms and he asked for a 1-O classification so that he would be fully exempted from military service. He was given a 1-A-O classification, that is, military service in non-combatant

capacity. He appeared before his Local Board and after his appearance he prepared a summary of the discussion, which document was introduced by the government as Exhibit B-11. The petitioner remembered Board member Clancy with whom he talked during his personal appearance but the government objected to the question pertaining to the conversation with the Board member. The objection was sustained (Ap. 40-41).

Petitioner read government Exhibit B-36, however, the question whether the statement therein attributed to him is correct was objected to by the government and objection was sustained (Ap. 42-43).

Petitioner was asked whether he stated to the Government Hearing Officer that it is not a violation of his Christian duty to manufacture goods for military consumption; he was asked whether he would be willing to be employed in a plant which manufactured guns; he was asked whether in case his employing company would decide to manufacture poison candy bars to be handed out to this country's enemies would he then be willing to remain employed. The government objected to all those questions. Objections to all questions were sustained (Ap. 42, 43).

Petitioner made an offer of proof that if he would have been permitted to answer the questions to which objections were made and sustained he would have answered with reference to government Exhibit B-36 that the same is false in the following particulars:

"It is false that the hearing officer in 1954 concluded that because of his employment for a concern producing material for military consumption he failed to sustain his claim objecting to noncombatant service; it is false that the Department of Justice concurred with the Hear-

ing Officer in his recommendation to give him 1-A-O classification, but to the contrary, the fact is that the Hearing Officer accepted the recommendation of the Department of Justice that no member of the Church of Jesus Christ be given 1-O classification; it is false because he did not make a statement that it is not a violation of his Christian duty to manufacture goods for military consumption; to the contrary, the fact is he told the Hearing Officer that the company that employed him for the past 8 years never manufactured anything other than civilian consumer goods although a small part of it may have been purchased by the government; it is false because he did not state to the Hearing Officer that he does not accept the responsibility for the actions of persons who use the products of his company, to the contrary, the fact is he stated the company manufactured civilian goods and that a person could not do anything in this country if he were to refuse to work on items that could be used for military purposes. In that case, a person could not raise corn or wheat for bread because that might be fed to the members of the armed forces (Ap. 43, 44).

As part of the offer of proof, petitioner would have stated that his objection to participation in military service even in noncombatant form is based on the New Testament injunction that you shall "Love your enemies"; that he accepted the religious teachings and tenets of the Church of Jesus Christ (Ap. 45). That he knows that that church was never engaged in the manufacture of any merchandise because it is a spiritual organization and not a manufacturing establishment. Community Industries, Ltd. which employs him is an Illinois corporation owned by the stockholders and that this company, at least in the last 8 years while he was employed there

never manufactured any war goods. He does not know whether some of the mattress covers or cooling coats were purchased by the army however, during the last 4 years as a candy salesman he knows that he never sold any candy to any military establishment. All his customers are civilian stores (Ap. 45, 46). Petitioner's offer included the testimony that he owes the government any service that doesn't involve personal participation in war. When he appeared before his Draft Board and asked for a 1-O classification he believed that he was entitled thereto because the Draft Board never doubted his sincerity and honesty. The reason that he was denied 1-O classification as he was told by Board member Clancy and Naxton was because that Board member did not believe that there was such a thing as a real conscientious objector opposed to both combatant and noncombatant service (Exh. B-8 and B-29). Further reason why he was denied 1-O classification was that Board Chairman McNutt believed that to get such classification petitioner would have to leave the country (Exh. B-29, Ap. 46).

As part of the offer of proof, petitioner stated that when he appeared before Hearing Officer Brittingham in 1954, he was told by him that the Hearing Officer would recommend a 1-O classification for him but he cannot do it because he received a letter from the assistant Attorney General of the United States and pursuant to this letter he is precluded from granting him or any member of the Church of Jesus Christ 1-O classification. The Hearing Officer told him that he believed him to be sincere, honest and of undoubted integrity. That the Hearing Officer does not believe in 1-O classification but as long as it exists it should be given to petitioner and other members of his church. Substantially the same statement was made to petitioner when he appeared the second time before Hear-

ing Officer Brittingham in 1956 and the statement so made to him by Mr. Brittingham is contrary to the statement contained in government Exhibit B-36. The government objected to the offer of proof and objection was sustained (Ap. 47).

Petitioner then testified before the jury, however, the government objected to the questions whether at the time when he remained standing instead of taking the step forward as he was asked at the induction center did he thereby intend to violate any of the laws of the United States. Objection was made to the further question as to his reason for not taking the step forward which would have indicated his induction into the armed forces (Ap. 48). Thereupon, petitioner made an offer of proof that at the time when he failed to take the step forward he was very unhappy that he could not carry out that order and that he didn't intend to violate any law. However, he remained standing during the induction ceremony because to take the step forward would have been a clear violation of the Command of the Lord since he cannot participate in military service in any form. He was greatly disturbed and unhappy because he saw the conflict between the Command of the Lord and the command of man. His choice was unquestionably to follow the Command of the Lord. He had to do that irrespective of any penalty. Because the punishment to violate the Command of the Lord meant to lose salvation and that penalty is greater than any a human can mete out. Government objected and objection was sustained (Ap. 49).

The government objected to the question before the jury whether petitioner at the time when he was at the induction center and he was ordered to be inducted did he believe that the classification given to him was given in violation of the law. Thereupon he offered proof that

he was aware of Sec. 6(j) of the Universal Military Training and Service Act and he was aware that that law provides that a person who is, because of religious training and belief conscientiously opposed to military service in any form should be given in lieu of induction civilian work for 24 months. He knew that under the law and under his circumstances he was entitled to 1-O but that he was denied such classificatien because the Selective Service Boards and the Department of Justice were biased and prejudiced against him and against the members of his church. He also believed and knew that the induction order given to him based on the classification given to him, was not in accordance with the rules and regulations and the law. Government objected to the offer of proof and objection was sustained (Ap. 50-51).

Two witnesses in addition to witness Hagerman testified to petitioner's good reputation (Ap. 51), and thereupon petitioner rested his case and renewed his motion for a judgment of acquittal which motion was denied (Ap. 52).

Petitioner submitted instructions embodying Sec. 6(j) of the Act and also pertaining to the bias and prejudice of the Selective Service Boards, however, the instructions so proffered were refused (Ap. 54).

The jury found the defendant guilty as charged in the indictment (Ap. 67).

Petitioner moved for a new trial. The motion was denied (Ap. 67, 68).

The court entered a judgment on the verdict, however, it offered petitioner to vacate the verdict of guilty and dismiss the indictment against him provided he submits to induction in accordance with the classification given to him. Petitioner informed the court that he cannot accept the 1-A-O classification (Ap. 67, 68).

The Trial Court then stated that it is not impressed with the idealism and excessive zeal for any particular faith when a resourceful criminal lawyer is employed to do what petitioner's counsel had done in this case, despite this fact that the court is willing to let the petitioner serve in the classification given him. Defense counsel in replying stated that there was nothing improper done by petitioner in defending himself. The Trial Court then stated that its prior expression was not so much in criticism of defense counsel but that it seemed to the court that these church members who are willing to pay a resourceful criminal lawyer to do what he did for them do not have the lofty ideals that they pretend to have (Ap. 69).

Petitioner then asked the Trial Court that the sentence be suspended with the condition attached that he does work of national importance for 24 months.

Petitioner was given the opportunity to make a statement to the court and he said that he accepted the judgment of the court as the Lord's Will whom he praised for still being free in spirit and soul to praise Him for the Grace and Courage to witness for Him in this courtroom (Ap. 70, 71). He stated that it matters not where he goes since he is a Son of God and he will have His Love, His Holy Spirit going with him whether in the penitentiary or in the street, a sidewalk, or in a Courtroom. He is very thankful and happy for the opportunity to witness for Jesus Christ and for the salvation that He did give to mankind of which he partook. He accepts the Lord's Will and he knows that all good things work together for good to those that love the Lord and that nothing can separate him from the Love of God. He can serve his Maker in jail or at work.

Thereupon the Trial Court committed petitioner to the custody of the Attorney General for a period of 2 years and six months and fined him fifteen hundred dollars and costs of prosecution. He was permitted to remain on bail in the sum of five thousand dollars pending appeal (Ap. 70, 71).

## REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

1) Petitioner submits that this case raises important questions as to the case law as well as the interpretation of the governing rules of administrative agencies as the Boards of Selective Service, which questions ought to be settled by this Court. We submit that at least one of the important and pertinent cases decided by this Court, *i.e.* the *Dickinson* case, which we understood as clearly settling the issues therein involved, was misread by the Court of Appeals for the Seventh Circuit since it put a greatly and, we say, prejudicially restrictive interpretation thereon and therefore, this Court ought to clarify the issue. There are other questions which have been decided by the various Circuit Courts of Appeals, but the instant decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict not only with certain decisions of this Court and of other Circuit Courts, but it also conflicts with a prior case decided by the Seventh Circuit.

2) This Court never decided the important question which undoubtedly underlies the denial of petitioner's claim to exemption both from combatant and noncombatant service. This question is if a registrant, as petitioner, is found by the Selective Service Boards to be sincere and honest, and that his claim is based on religious training and belief, and if he is employed in a candy factory as a salesman and sales representative, which

factory sells a part of its product to the government, does that fact satisfy this Court's requirement as to basis in fact for the denial of the *prima facie* established case for full exemption from military service.

3) This Court never decided whether the so-called *de novo* classification by the Appeal Board which retained petitioner in the classification given to him by the Local Board satisfied the rule that the draftee is entitled to fair play on every step of the processing when the record discloses that the Local Board illegally denied petitioner's claim that was established *prima facie*.

4) Is it sufficient for the government to conjure up a basis in fact by presenting unfounded evidence as to the frame of mind of petitioner and particularly is that sufficient when the defendant is denied the right to present evidence contrary to that presented by the government.

5) Is it prejudicial error for the government to offer before a jury and for its perusal petitioner's Selective Service file and then for the Trial Court to refuse permission to him to question some of the documents in the file, and to refuse permission to him to present evidence contrary to some of the documents in the file?

6) Was it prejudicial error on the part of the Trial Court to refuse petitioner's request for an order upon the government to produce the report of the Hearing Officer to the Department of Justice when petitioner challenged the truthfulness of the Recommendation of the Department of Justice to the Appeal Board, as far as it referred to the report of the Hearing Officer, no part of which report was before that Board or the Court?

## ARGUMENT.

### I.

### THIS COURT'S HOLDING IN THE DICKINSON CASE TO THE EFFECT THAT THE PRIMA FACIE CASE MAY NOT BE DISREGARDED BY THE BOARD UNLESS THE RECORD DISCLOSES A BASIS IN FACT THAT IS CONTRARY TO THE REGISTRANT'S CLAIM. THIS HOLDING IS MISINTERPRETED BY THE COURT OF APPEALS.

The Court of Appeals in its opinion states that (pp. 3-4)

> "Parker relies on *United States* v. *Dickinson*, 346 U.S. 389 (1953) to set aside the classification. The Appeal Board's decision on the basis of a registrant's file, giving 'consideration' to the recommendation of the Department of Justice, is usually the final determination of the Selective Service System. *Witmer* v. *United States*, 348 U.S. 375, 377 (1955). In that case, the court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, 'incompatible with' Dickinson's proof, to rebut his *prima facie* case, made out by objective facts. That distinguished Witmer's case from Dickinson's, and distinguishes Parker's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's which involved a ministerial status. Once Dickinson's status was determined *prima facie*, the Government was required to produce a basis in fact on which the court could decide his claims were not as stated. In *Parker's* case the question is whether there is affirmative evidence produced by the Government that he has not 'painted a complete or accurate picture.' *Witmer* v. *United States*, 348 U.S. 375, 382 (1955)."

As we read the above, the Court of Appeals held that in the *Dickinson* case there was no evidence "incompat-

ible with" Dickinson's proof to rebut his *prima facie* case made out by objective facts, but that teaching doesn't apply to petitioner. Why not, because petitioner's claim "cannot be determined on objective facts such as Dickinson's which involve the ministerial statu." In petitioner's case the Court of Appeals held that that ruling does not apply because of the assumption that the government produced evidence that petitioner did not paint a complete and accurate picture. As we have shown before, there is no evidence whatsoever that the petitioner did not paint either a complete or accurate picture unless a story made of half gossip, half rumors with a dash of assumption and a twist of presumption, is evidence.

The Court of Appeals further states (p. 4) that when the record discloses any evidence of whatever nature which is incompatible with the claim of exemption "courts may not inquire further as to the correctness of the board's order. *United States* v. *Simmons*, 7 Cir., 213 F2d. 901, 904 (1954), reversed, other grounds, 348 U.S. 397 (1955)."

We respectfully submit that this court in the *Simmons* case talked about true evidence, legal evidence and not about anything that, maybe, *albeit* incorrectly, described as evidence. We believe that this court did not hold in that case, or in any other case, that it is sufficient for the government to present a letter from the Department of Justice directed to the Appeal Board and accept the statements therein as evidence even though petitioner challenged the voracity of many of those statements.

We do not believe that this court held in the *Dickinson* case that its teaching applies only to ministerial claim, for the reason that such a claim can be measured by objective evaluation. We believe that the holding of the

*Dickinson* case applies to petitioner here even though his subjective claim may have to be scrutinized by more exacting tools than objective yardsticks. We believe that this court will agree with us that the claim of a conscientious objector can be tested for sincerity, truthfulness, honesty and integrity. It was done so by the Local Board which believed in his sincerity. It was so tested by the Hearing Officer who saw him face to face and found his sincerity not wanting.

Petitioner submits that in accordance with the teachings of the *Dickinson*, *Sicurella* and *Simmons* cases and under the circumstances disclosed by the record here, there is no basis in fact for the Board's denial of his claim for full exemption from military service and therefore, a writ of certiorari ought to issue and the judgment ought to be reviewed.

II.

**THE EMPLOYMENT OF PETITIONER AS NON-MANAGERIAL WORKER IN THE CANDY FACTORY, A SMALL PART OF WHICH CANDY IS PURCHASED BY THE GOVERNMENT IS NO BASIS IN FACT TO DENY HIS CLAIM TO EXEMPTION.**

Exhibit B-18, introduced by the government, contains *inter alia* "The Hearing Officer concluded that the registrant is sincere and conscientiously opposed as a matter of religious principle to combatant participation in war and that he is sincerely and conscientiously opposed to acceptance of military jurisdiction."

Government's Exhibits B-8 and B-17 show that the Local Board which had an opportunity to see petitioner face to face questioned not for a moment that he is sincere and honest. The Board believed that he is a good member of the church. Nevertheless, the Local Board and the

Appeal Board refused to grant him the 1-O classification that he asked for, and which he maintained he was entitled to because of his religious training and belief, and because of the exemplary life that he led according to such belief.

Searching the record, we are unable to find anything therein which in any sense was incompatible with his claim for exemption.

The opinion of the Court of Appeals in the *Parker* case, applied here (page 3) clearly indicates that that Court found a basis in fact in petitioner's employment by Community Industries. That Court says:

> "The Department of Justice hearing officer on Parker's appeal to the Appeal Board found that Parker worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army rations, valves used on naval vessels, and other items usable in war; that Parker did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Parker viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;' and that Parker subscribed to the beliefs and opinions of the Harshmanites." (Read R. R. Harshman for Parker)

While the above holding of the Court of Appeals points to the only possible basis in fact, we submit, as we did in our Petition for Rehearing, that the same is studded by misstatements. One of the misstatements results from the fact that the court can not know what the Hearing Officer found because as we will show hereafter, the Trial Court refused to order the Hearing Officer's Report into the Court even though petitioner challenged that part of the Department of Justice's Recommendation

to the Appeal Board (B-18 and B-36) that referred to the Hearing Officer's Report. As the record discloses and as the summary of the case indicates the Community Industries which employed petitioner is *not a Harshmanite enterprise*, whatever that may mean, but rather it is an Illinois corporation, owned by the stockholders. There is another misstatement; since there is not one iota of evidence that Community Industries produced WAC uniforms, the only reference to that is in the Department of Justice's recommendation (B-18 and B-36). The only evidence as to any kind of manufactured goods purchased by the government from the dress division of the company is the testimony of witness Hagerman (Ap. 33), that the dress division in times past may have sold some of its products to the government. There is not an iota of evidence except the *ex parte* statement in the Department of Justice's recommendation that the company ever manufactured candy for army rations. The only evidence with reference to candy is contained in witness Hagerman's testimony to the effect that in recent years some of the candy was sold to government sources. (Ap. 35).

There is a statement in the Court of Appeals opinion above quoted to the effect that Community Industries produced "valves used on naval vessels and other items usable in war." There is *not an iota of evidence justifying that statement* unless this Court is willing to accept the *ex parte* statement of the Department of Justice (B-18 and B-36) which was challenged by the petitioner as to its veracity and factualness. The only evidence found as to "war goods" mentioned in B-36 appears to show that those "war-goods" were made out of whole cloth because the record clearly denies any manufacture of destructive items (Ap. 35-37).

The Court of Appeals opinion also held that Community Industries were manufacturing "other items usable in war." Petitioner respectfully submits that no such items were manufactured as far as the record discloses and if there was any manufacturing done of such items it was done by the Department of Justice in its *ex parte* recommendation, B-18 and B-36, and by the Court of Appeal accepting such *ex parte* statements as the gospel truth, even though petitioner categorically denied their truthfulness.

The Court of Appeals found that petitioner "did not consider it immoral or a violation of his Christian duty to manufacture ammunition." This statement is based not on the record other than B-18 and B-36, *i.e.* contradicted statements of the Department of Justice addressed to the Appeal Board. The record is to the contrary because defense witness Hagerman testified that no member in good standing would ever manufacture items that would be used solely for destructive purposes. That no member in good standing, as petitioner is, would manufacture items of war (Ap. 35). Petitioner was not permitted because of the objection of the government to answer the question whether he ever stated to the Hearing Officer or to anyone else that it is not a violation of his Christian duty to manufacture goods for military consumption. (Ap. 42-32). In his offer of proof he stated that he told to the Hearing Officer that he knows that the company that employed him for the past 8 years never manufactured any war goods, it manufactures only items for civilian consumption though some of the products may have been bought by the government.

The Court of Appeals opinion above quoted contains a sentence in quotation marks which says that petitioner considered the members of his church "reluctant to manu-

facture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;", then the Court goes on to say that petitioner subscribed to the beliefs and opinions of the Harshmanites. The quoted sentence has its source in the recommendation of the Department of Justice repeatedly challenged by petitioner as to its truthfulness and it does not come from any other part of the record. The record shows that he denied ever making the statement to the Hearing Officer "It would not be considered immoral or a violation of their Christian duty to manufacture ammunition." He denied making the statement to the Hearing Officer and in fact, to anyone else that "reluctance to manufacture munitions is not a matter of religious belief, but merely a matter of preference." Petitioner in his offer of proof stated that he owes the government any service that does not involve personal participation in war. (Ap. 46).

Having stripped the above quotation from the Court of Appeals opinion of all erroneous statements, what is left there is the fact admitted by the petitioner that he, for the past 4 years was working for Community Industries, Ltd., an Illinois corporation, as a candy salesman in its candy division. He also admitted that some of the candy manufactured by his company may have been sold to the government.

The petitioner submits that his employment as a civilian doing the innocuous work of selling candy cannot be and ought not to be considered a basis in fact for the Board's denial of his *prima facie* established case for 1-O classification. It cannot be considered basis in fact even if it is admitted that some of the candy was purchased by the government.

We do not believe that this Court will consider petitioner's employment as a candy salesman a basis in fact

to deny his classification because it was said by this Court that a draftee's willingness to fight at Armageddon does not indicate his willingness to participate in war because:

> ". . . Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law." *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, 406.

The government's own evidence, Exhibits B-18 and B-36, that being the *ex parte* recommendations of the Department of Justice to the Appeal Board, shows that the members of the Church of Jesus Christ as petitioner here, are "strangers in the land of Sullivan" and as such strangers and because of economic determinism they must find work which permits them to live and labor in accordance with their beliefs. The Community Industries gives them that possibility. To deprive petitioner of his *prima facie* established claim to exemption from full military service because he is so employed would be tantamount to say to him that he has to choose between not earning his livelihood or forfeiting his right to follow his conscience.

The Court of Appeals for the Seventh Circuit decided the case of *United States* v. *Wilson*, 215 F2d 443. In that case, the Court held that, they do not think,

> "The defendant's employment as a railroad telegraph operator was in any way inconsistent with his claim to exemption as a conscientious objector."

That court did not so hold because,

> "It would be wholly unrealistic to construe this (Sec. 6(j)) language to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore meet the statutory test for exemption."

That Court found it difficult to conceive,

> "of any gainful activity which, in periods of extensive mobilization and training, would not in some manner aid the common purpose. Moreover, the act expressly recognizes that one may engage in civilian work contributing to the national welfare without losing the right to be classified as a conscientious objector."

The pastor of the church wrote to petitioner's Draft Board and the writing was introduced by the government as Exhibits B-3, B-4 and B-5. The pastor's statement, we submit, sums up the problem because,

> "If it is wrong to produce anything which is helpful to the government in time of war then it is wrong to engage in farming at such a time. In fact, logic would force one at such a time to refuse to engage in any constructive effort . . ."

Petitioner submits that this Court should declare that his, and other innocuous employments, even though helpful to the government, is not basis in fact to refuse full conscientious objector classification to one who *prima facie* established that he is entitled to it.

## III.

## LACK OF DUE PROCESS AND FAIRNESS AT ANY STEP OF THE SELECTIVE SERVICE PROCESSING WILL CARRY OVER AND WILL TAINT THE WHOLE PROCEEDINGS.

Petitioner claimed in the Trial Court as well as before the Court of Appeals that the Local Board while admitting his sincerity and the justification of his claim for full conscientious objector classification based on his religious training and belief nevertheless illegally denied him such classification. He submitted that pursuant to Exhibits B-11 and B-29 introduced into evidence by the government he recapitulated the transaction before the Local Board as it transpired a day before. He recalled in this document which was never contradicted by any evidence that when the Board denied him 1-O classification there was an inquiry as to reasons of such denial. One of the Board members, Mr. Clancy, stated that "I don't believe there is any such thing as a real conscientious objector. I believe that any person that lives in America and makes his living in this country should be willing to fight for his country." (B-8)

Further, Board member Saxton stated:

> "That as far as he was concerned there was no such thing" as 1-O classification.
>
> "Board Chairman McNutt said that "He believed to get this classification" that is 1-O classification, petitioner would have to leave this country. (B-29)

Petitioner submitted that such reasoning by Draft Board members clearly indicates that the denial of the 1-O classification was not based either on law or on the rules of the Board. The Court of Appeals on that point found as follows: (p. 5)

"The Local Board clerk testified that the Board 'felt they were doing their best to acknowledge the registrant's religion * * *' and thus, according to Parker, showed that emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, *de novo* proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board, *United States* v. *Van Hook*, 7 Cir., 284 F.2d 489, reversed and remanded for resentencing, 365 U.S. 609 (1961)".

Petitioner knows that the Appeal Board classification superseded the Local Board's hearing but he respectfully disagrees with the Court of Appeals that "there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board." To the contrary, he submits they denied his claim to 1-O classification on some extraordinary non-legal grounds. The Appeal Board did not see him, did not talk to him, nevertheless upon the review of the files left him in the same classification as given to him by the Local Board. Petitioner presents as his presumption that the clearly expressed bias and prejudice of the Local Board carried over to, and was adopted by the Appeal Board and the hearing before the latter Board was not *de novo* but was a sham and nothing more.

Further the petitioner says that there is another presumption and that is that the recommendation of the Department of Justice containing a great many untruthful statements as he and his witnesses offered to testify, did influence the Appeal Board to his great prejudice. He doesn't believe that this court will permit the judgment to stand when the same is bottomed not on evidence

but rather on guess, since there is no denial of bias and prejudice somewhere along the way. It is but speculation and guess work that the bias "may not" prejudice him at all. To permit the judgment to stand would be equivalent to guess petitioner into the penitentiary.

## IV.

## BASIS IN FACT IS SOMETHING PALPABLE AND MUST BE TENABLE AND CONJECTURES AND PRESUMPTIONS ARE NOT SUFFICIENT.

The Court of Appeals in its opinion (p. 4) wrote that:

> "Parker also relies upon *Batterton* v. *United States*, 8 Cir., 260 F.2d 233 (1958), which is not in his favor on the facts before us. And each case must 'of necessity be based on the particular beliefs of the individual.' *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). The court there said the record 'does not even by indirection,' deny Sicurella's sincere religious beliefs. Parker argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said 'we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity.' p. 388." (read R. R. Harshman for Parker).

At this point the statement stops though one may presume that the juxtaposition intended to indicate that while Sicurella's sincerity was admitted, Harshman's was not. As we pointed out heretofore, this is a total misreading of the record because his sincerity was admitted by the Local Board and by the Hearing Officer, (that is in those instances where he had a personal appearance) and this finding of sincerity was not challenged at any other instance. We believe that petitioner's sincere religious beliefs were not denied "not even by indirection" just as in the *Sicurella* case. However, the Court of Appeals

goes on to say that "The Department of Justice recommendation disclosed Parker's (read Harshman's) view that it would not be considered immoral or a violation of their Christian duty to manufacture ammunition . . .' This fact would suffice to rebut Parker's (read Harshman's) *prima facie* showing." The statement that in his view he, as a Christian, could engage in the manufacture of ammunition, which statement petitioner submits is false, is cited by the Court of Appeals twice. (pp. 3-4). The Petitioner submits that the Court of Appeals accepts the statement contained in the Department of Justice's recommendation as a *fact* even though petitioner and his witnesses repeatedly challenged the truthfulness of these statements. He repeatedly denied the so-called facts to be facts and did show as the record discloses that they are the result of someone's dreams if not of his nightmares.

Petitioner submits that the Court of Appeals "instead of chasing those rabbits"* which it designated as facts, should have inquired why the true facts were not permitted by the Trial Court to be disclosed when the petitioner challenged the Department of Justice's recommendation and in support of his challenge he asked for an order to produce the Hearing Officer's report (to which matter we shall return later). Here, however, petitioner submits that it was error and prejudicial at that, for the Trial Court to exclude the testimony of witness Hagerman and the offer of proof made on his behalf and so was it prejudicial error to exclude petitioner's own testimony and his offer of proof because such proffered testimony denied the allegations to be facts, notwithstanding the Court of Appeals calling it fact. Petitioner also submits that prejudice resulted from the Trial Court's

* As was said by Justice Clark in his concurring opinion, **Baker v. Carr**, 82 S.Ct. 691 (1962) p. 732.

precluding him from presenting testimony on this court is shown because thereby the Court of Appeals was misled to accept non-facts as facts (Ap. 35, 43, 44, 45-47). Because of the unsubstantial and unsubstantiated evidence of the government attempting to overcome petitioner's *prima facie* case this court ought to grant a certiorari and ought to review the case.

## V.

## THE SUBMISSION OF THE SELECTIVE SERVICE FILE TO THE JURY WAS PREJUDICIAL TO PETITIONER AND SO WAS THE TRIAL COURT'S RULING PRECLUDING HIM FROM QUESTIONING SOME OF THE DOCUMENTS IN THE FILE.

The Court of Appeals in its opinion (p. 6) held that the Trial Court,

> ". . . erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, '. . . nothing in the file is pertinent to any issue proper for jury consideration.' But we see no prejudice from this fact since the jury had already heard oral testimony of the substance of its contents."

Petitioner is hard put and he finds it next to impossible to follow the Court of Appeals' reasoning that while it was error to have the Selective Service file sent to the jury, that there was no prejudice "since the jury had already heard oral testimony of the substance of its contents."

Petitioner complained before and does now exactly on this point since he knows that the jury heard oral testimony as to the file; the jury was permitted to "peruse" the whole of the file while he was not permitted to question any of the documents therein (Ap. 41).

Petitioner objected and now objects because the jury heard orally about the Department of Justice recommendation (Exhibits B-18 and B-36) but he was not permitted to show that this recommendation contained many misstatements, falsehoods, particularly with reference to what petitioner said to the Hearing Officer and what the Hearing Officer said to him (Ap. 42-43). The Petitioner objected and does now because the government insisted upon presenting the Selective Service file before the jury and then objected and the Court sustained the objection to his attempts to go into the content of the selfsame file. Petitioner believes that he had the right and that this court will uphold his right to explain what was in that file and what part thereof is contradicted by him particularly after the Trial Court over the objection of petitioner admitted the Selective Service file as a whole into evidence (Ap. 11).

In *Cox* v. *United States*, 332 U.S. 442 (1947), 457, 68 S.Ct. 115, in footnote 4, this court refers to *Smith* v. *United States*, (4 Cir.) 157 F2d. 176, wherein the Court of Appeals of that circuit "held that the submission of the issue of classification to the jury constituted reversible error." Petitioner admits that the Trial Court attempted by its instructions to make it clear to the jury that the classification is not before it, however, the jury was thus put before a dilemma since it had the file before it but it was told to look at it only with one eye and thus a situation was created which undoubtedly prejudiced him. The prejudice was the greater because he was precluded by the Trial Court from questioning some of the documents in his file.

Because there is a conflict between the holdings of, in this case, of the 7th and that of the *Smith* case in the 4th circuit, petitioner respectfully submits that this court

ought grant the petition for a writ and to review the case and thus decide which of the two antagonistic positions is the law.

## VI.

## THE REFUSAL OF THE TRIAL COURT TO ORDER THE PRODUCTION OF THE HEARING OFFICER'S REPORT WHEN THE TRUTHFULNESS OF THE REFERENCE THERETO WAS CHALLENGED BY PETITIONER WAS HIGHLY PREJUDICIAL TO HIM.

The Court of Appeals disposes of petitioner's challenge to the Trial Court ruling twice refusing an order to produce the Hearing Officer's report when it states (p. 5)

> "There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report; and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file. *Gonzales* v. *United States*, 364 U.S. 59 (1960).

Petitioner has no quarrel with the statement that the regulations, at least since 1952, do not require the Hearing Officer's report be made part of the file, but he quarrels with the holding that the decision in this court in *Gonzales* v. *United States*, 364 U.S. 59, 75 S.Ct. 409, means that under the circumstances of this case such an order to produce was not required. To the contrary, he says that he was prejudiced by the denial of his motion because as this court said in the *Gonzales* case

> ". . . petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of 'favorable evidence developed at the hearing' and a denial of a 'full and fair hearing,' no such claim was made by petitioner

at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. *In the light of these circumstances*, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes." (page 557) (emphasis added)

In our instant case, all of the missing factors in the *Gonzales* case are present. Richard Harshman did challenge the fairness of his hearing throughout his administrative process and particularly challenged in government's Exhibit B-39 the correctness of the hearing officer's report found in government's Exhibit B-36 and continued his argument in the trial court. Richard Harshman during his testimony, continued to state that the remarks of the hearing officer in his report were not factual and denied the quoted contents of the hearing officer's report most pointedly, claiming that the hearing officer's report would contain evidence favorable to him. In the instant case, we believe that the hearing officer's report was the very basis for the Department of Justice's recommendation and if such was repudiated, certainly this is a direct issue and the relevancy of the hearing officer's notes and his original report to the Department of Justice is very clear. The defendant submits that under the circumstances of this case and to obtain a full and fair hearing, it was necessarily required that the report of the hearing officer be produced.

Petitioner submits that the Appeal Board rejected his claim on an incomplete presentation because it had before it the recommendation of the Department of Justice (B-18 and B-36) which referred to a Hearing Officer's

report and pertained to "some part of that report." This alleged quotation was challenged by the petitioner both before the Appeal Board and before the Trial Court. Neither of these authorities had the Hearing Officer's report before it and of course, neither of them could determine whether the challenge of the petitioner was justified. By force there was a choice to be made and decide whether the Department of Justice recommendation was non-factual or whether the petitioner was not honest in his challenge of the Department of Justice allegations. From the fact that both the Appeal Board and the Trial Court ruled against petitioner one must presume that the sincerity of his challenge to Exhibits B-18 and B-36 was considered negated which undoubtedly was carried forward and his sincerity as a whole was thereby questioned. The prejudice so resulting was great and irremediable. There was error in denying his motion to order the production of the hearing officer's report and in the light of the circumstances of this case, the decisions of the lower courts are in direct conflict with the decision of this court in the case of *Gonzales* v. *United States*, 364 U.S. 59, 80 S.Ct. 1554.

In view of this prejudicial error this court ought to grant a certiorari and ought to review the case.

## CONCLUSION.

"Fundamental too, in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after a fair trial. The hearing, moreover, must be a real one, not a sham or pretense." *Palko* v. *State of Conn.*, 302 U.S. 319, 58 S. Ct. 149.

Petitioner submits that he was condemned without a fair trial; that the hearings that he received throughout the Selective Service proceedings were not real but solely pretenses.

The Court of Appeals for the Seventh Circuit holds that:

> "The briefs, appendices, and records in the *Parker* and *Harshman* appeals are substantially identical. The claims of error at the trial, the contentions on appeal, the cases in support of the contentions, and the arguments are virtually the same in both appeals. The indictments, except for names of the defendants, are identical."

and because of that it held that that court's decision in *United States* v. *Parker*, (No. 13585) controls the decision in this case (No. 13586). Petitioner does not argue when that court states that his case is substantially identical with that of Parker whatever the term "substantial" may mean. However, he wants to point out and notwithstanding of the Court of Appeals holding the two cases identical, the Trial Court found it proper to sentence this petitioner to imprisonment for a term of two years, six months and to fine him with the sum of fifteen hundred dollars while in the *Parker* case, that petitioner was given a prison term six months shorter and a fine of five hundred dollars less than was given to this petitioner. One wonders for the reason of such additional severity of the Trial Court's judgment. If one looks upon the record, one must conclude that this additional penalty may have been the result of this petitioner's statement to the Trial Court as it appears in Appendix 70, 71, and as it was referred to hereinabove. One wonders whether the Trial Court gave him the extra punishment because he was willing to accept judgment of the Trial

Court as the Lord's Will. One wonders whether he was so singled out because he stated that he can serve his Maker in jail or at work. The fact, however, is, that in two cases which the Court of Appeals for the Seventh Circuit found to be "substantially identical" petitioner was given a more severe sentence, thus the substantial identity of the two cases was done away with.

For the reasons hereinabove set forth, he submits that the writ of certiorari ought to be granted.

Respectfully submitted,

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Chicago 3, Illinois,
*Attorneys for Petitioner.*

Chicago, Illinois
Oct. 4, 1962.

## APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13586 SEPTEMBER TERM, 1961 | APRIL SESSION, 1962

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| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICHARD R. HARSHMAN, *Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

August 20, 1962

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal from a judgment upon a verdict of a jury, convicting defendant of violation of § 12 of the Universal Military Training and Service Act[1] by refusal to submit to induction into military service. He was sentenced to the custody of the Attorney General for two and one-half years, and was fined $1,500.00.

A companion appeal, No. 13585, *United States* v. *Malcolm Lebert Parker*, is being filed simultaneously herewith.

Harshman, like Parker, was classified as 1-A-O because of his beliefs founded on the Harshmanite[2] religion.

[1] 50 U.S.C.A. App. § 462.

[2] The Church of Jesus Christ, Sullivan, Illinois.

The briefs, appendices, and records in the *Parker* and *Harshman* appeals are substantially identical. The claims of error at the trial, the contentions on appeal, the cases in support of the contentions, and the arguments are virtually the same in both appeals. The indictments, except for names of the defendants, are identical.

For these reasons, our decision in *United States* v. *Parker* controls our decision here.

For the reasons given in *United States* v. *Malcolm Lebert Parker*, No. 13585, the judgment in this cause is AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Monday, August 20, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win Win G. Knoch, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

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United States of America,
Plaintiff-Appellee,
No. 13586 vs.
Richard R. Harshman,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Friday, September 14, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

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| | |
|---|---|
| United States of America,<br>Plaintiff-Appellee,<br>No. 13586 vs.<br>Richard R. Harshman,<br>Defendant-Appellant. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

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IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13585 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MALCOLM LEBERT PARKER, *Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

August 20, 1962

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal from the judgment on verdict of a jury, convicting defendant of violation of § 12 of the Universal Military Training and Service Act[1] by his refusal to submit to induction into military service. He was sentenced to the custody of the Attorney General for two years, and was fined $1,000.00.

The defendant Parker, a member of the Harshmanite religious sect,[2] registered for the draft before Local Board 177 in Sullivan, Illinois, May 9, 1955. He was classified 1-A-O[3] and subsequently that classification was confirmed by the Board after a hearing upon Parker's objection to the classification on the ground that his "religious belief."

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[1] 50 U.S.C.A. App. § 462.

[2] The Church of Jesus Christ, Sullivan, Illinois.

[3] This classification covers those who are opposed to combatant service but inductible in a noncombatant capacity.

On Parker's appeal to the Illinois State Appeal Board, the Department of Justice, by virtue of § 6(j)[1] of the Act, made an inquiry into the case, and granted a hearing upon his claim to an exemption as a conscientious objector under classification 1-O.[2] He and four witnesses appeared before the hearing officer who found Parker had not sustained his claim and recommended the 1-A-O classification. The Department of Justice concluded that Parker had established his conscientious objection to combatant military service but not with respect to non-combatant service. The Department recommended to the Appeal Board that he be classified 1-A-O.

Parker submitted his reasons in writing to the Appeal Board for not accepting the classification. The Board by unanimous vote again classified him 1-A-O. He was then examined physically and found acceptable for service. The Local Board thereafter "reopened and considered anew" the classification and retained him in 1-A-O. No further steps were taken by Parker for another personal appearance or appeal. He was ordered by the Board to report for induction. He reported, but refused to submit to induction. His indictment, trial, and conviction followed.

We see no merit in Parker's contention that there was no basis in fact to support the court's decision not to interfere with his classification.

The Act makes no provision for the customary scope of judicial review; courts are not to weigh the evidence to determine whether the classification was justified; if in conformity with regulations, the Board decisions are final, even if erroneous; and the question of jurisdiction is reached only if there is no basis in fact. *Estep* v. *United States*, 327 U. S. 114 (1946).

The District Court's function was to ascertain "whether there was a basis in fact for the classification," *United*

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[1] U.S.C.A. App. § 456(j) (1961 Supp.).

[2] This classification covers those individuals conscientiously opposed to participation in the armed forces in either a combatant or noncombatant capacity.

*States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, 494, reversed and remanded for resentencing, 365 U. S. 609 (1961). The court was confined to a review of Parker's file in deciding whether a basis in fact existed. *United States* v. *Mohammed*, 7 Cir., 288 F. 2d 236, 238, cert. denied, 368 U. S. 820 (1961). It was not to look for substantial evidence to support the determination of the Local or Appeal Board. *Witmer* v. *United States*, 348 U. S. 375, 381 (1955).

In his classification questionnaire Parker claimed a status of conscientious objector to participation in war in any form. He requested, filled out and returned to the Local Board the special S.S.S.* form reiterating his claim "by reason of my religious training and belief;" stating his belief in a Supreme Being; his membership in the Church of Jesus Christ in which he was raised and whose teachings he accepted; and in a typewritten statement expanded on his belief and its basis in the Bible.

The Department of Justice hearing officer on Parker's appeal to the Appeal Board found that Parker worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army rations, valves used on naval vessels, and other items usable in war; that Parker did not consider it immoral or in violation of his Christian duty to manufacture ammunition; that Parker viewed the Harshmanite "reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;" and that Parker subscribed to the beliefs and opinions of the Harshmanites.

Because we have concluded the District Court did not err in deciding there was a basis in fact for the classification, it follows that the induction order was not void. And it also follows that the District Court did not err in denying Parker's motion for acquittal at the close of the Government's case, for want of a basis in fact.

Parker relies on *United States* v. *Dickinson*, 346 U. S. 389 (1953) to set aside the classification. The Appeal Board's

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*The Selective Service System, herein referred to as the S.S.S.

decision on the basis of a registrant's file, giving "consideration" to the recommendation of the Department of Justice, is usually the final determination of the Selective Service System. *Witmer* v. *United States*, 348 U. S. 375, 377 (1955). In that case, the court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, "incompatible with" Dickinson's proof, to rebut his prima facie case, made out by objective facts. That distinguished Witmer's case from Dickinson's, and distinguishes Parker's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's, which involved a ministerial status. Once Dickinson's status was determined prima facie, the Government was required to produce a basis in fact on which the court could decide his claims were not as stated. In Parker's case the question is whether there is affirmative evidence produced by the Government that he has not "painted a complete or accurate picture." *Witmer* v. *United States*, 348 U. S. 375, 382 (1955). "When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption" courts may not inquire further as to the correctness of the board's order. *United States* v. *Simmons*, 7 Cir., 213 F. 2d 901, 904 (1954), revered, other grounds, 348 U. S. 397 (1955).

Parker also relies upon *Batterton* v. *United States*, 8 Cir., 260 F. 2d 233 (1958), which is not in his favor on the facts before us. And each case must "of necessity be based on the particular beliefs of the individual." *Sicurella* v. *United States*, 348 U. S. 385, 390 (1955). The court there said the record "does not even by indirection," deny Sicurella's sincere religious beliefs. Parker argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said "we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity." p. 388.

We see no inconsistency in the Department of Justice and the Board recognizing Parker's sincerity of religious belief and the classification based on the admitted fact of

his willingness to participate in the production of war goods. The Department of Justice recommendation discloses Parker's view that "it would not be considered immoral or a violation of their Christian duty to manufacture ammunitions * * *." This fact would suffice to rebut Parker's prima facie showing. We do not read the language of *Witmer* v. *United States*, 348 U. S. 375 (1955) that "there must be some inference of insincerity or bad faith" to mean that there must be evidence that registrant is a hypocrite or liar. The Board was not required to classify Parker 1-O merely because he stated he was opposed "to participation in war in any form." His testimony taken as true disclosed that he did participate in aiding the war effort. There is a distinction between a conviction based on a sincere religious belief and a conviction based on an erroneous inference about what participating in a war means. In *United States* v. *Wilson*, 7 Cir., 215 F. 2d 443 (1954), the nature of Wilson's employment was not incompatible with his prima facie proof of 1-O classification and the file contained no affirmative evidence to support the National Board's 1-A classification. That case does not aid Parker.

Parker's file does not show that he was given notice of the time and place of hearing by the Department of Justice examiner or sent a copy of the Department recommendation to the Appeal Board, to which he was entitled to file a written reply. He contends there was not full compliance therefore with the Selective Service regulations. The Department of Justice letter to the Board discloses a hearing was had and the file contains Parker's letter or "reply" to the Appeal Board. There is no substance to this contention. And we are not to determine the truth or falsity of the evidentiary basis of the Department of Justice recommendation unless the irregularities affected the Appeal Board's review. *United States* v. *Moore*, 217 F. 2d 428, reversed on other grounds, 348 U. S. 966 (1955).

The Local Board clerk testified that the Board "felt they were doing their best to acknowledge the registrant's religion * * *" and thus, according to Parker, showed that

emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, de novo proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. *United States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, reversed and remanded for resentencing, 365 U. S. 609 (1961). Nor is there merit in the contention that the recommendation of the Department of Justice stating that the courts consistently upheld 1-A-O classification where there was a willingness to do work supporting the war effort unduly influenced the Appeal Board and denied him due process. Since there is affirmative evidence to support the classification, we presume in the absence of further showing that the Appeal Board did not fail in its duty to respect Parker's rights.

There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report; and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file, *Gonzales* v. *United States*, 364 U. S. 59 (1960).

The only relevant questions at the trial were whether there was a basis in fact for the classification; and if so, whether Parker refused to submit to induction. The first question was for the judge, not the jury, upon the S.S.S. file. *Cox* v. *United States*, 332 U. S. 442 (1947), rehearing denied, 333 U. S. 830 (1948). The trial court properly refused to permit cross-examination of witnesses before the jury, on the S.S.S. file, and properly sustained objections in testimony and rejected offer of proof on testimony bearing on the classification by the Local Board.

The only question for the jury in this case was whether Parker refused to submit. The court erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, "* * * nothing in the file is pertinent to any issue proper for jury consideration." But we see no prejudice

from this fact since the jury had already heard oral testimony of the substance of its contents. The court properly precluded testimony that Parker's intention in refusing to "step forward" was merely to test the Draft Board's right to order his induction.

The court refused to give Parker's proferred instruction setting forth § 6(j) of the Act. This was not error. The question of exemption from service was not for the jury. Nor was there error in the refusal to give an instruction on bias and prejudice, because there was no evidence from which an inference could be drawn that bias or prejudice influenced the Appeal Board's classification. We have read the other refused instructions, and arguments for them in the transcript, and see no error in the rulings. The court should not have instructed the jury on its "independent review of the evidence" nor on credibility of witnesses in this case. But there errors were not prejudicial.

The judgment is AFFIRMED.

## APPENDIX B.

50 USC. 462; 62 Stat. 622—OFFENSES AND PENALTIES.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections), or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or

more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (June 24, 1948). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing. . . . . June 24, 1948, c. 625, Title 1, p. 12, 62 Stat. 622.

## PART 1622—CLASSIFICATION RULES AND PRINCIPLES

### General Principles

1622.1 *General Principles of Classification.*—(a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States, every male alien admitted to the United States for permanent residence, and every male alien who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of clause (A) or clause (C) of section 6(c)(2) of such Act shall remain liable for training and service until they attain the age of 28, and that persons who on June 19, 1951, were, or thereafter are, deferred under any other provision of section 6 of such Act shall remain liable for training and service until they

attain the age of 35. Certain exemptions and deferments are specifically provided; others are authorized to be provided by regulations promulgated by the President.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.2 *Classes.*—Each registrant shall be classified in one of the following classes:

CLASS I

Class I-A: Available for military service.

Class I-A-O: Conscientious objector available for noncombatant military service only.

Class I-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.

Class I-D: Member of reserve component or student taking military training.

Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

1622.11 *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form

and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.16 *Class I-W: Conscientious Objector Performing Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with the order of the local board.

(b) In Class I-W shall be placed any registrant who subsequent to being ordered by the local board to perform civilian work contributing to the maintenance of the national health, safety, or interest has been released from such work by the local board after satisfactorily performing the work for a period of twenty-four consecutive months or has been sooner released from such work by the Director of Selective Service under the provisions of section 1660.24 of this chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "Rel." and, upon attaining an age beyond the maximum age of liability for military service under the provisions of the selective service law, all such registrants shall be reclassified in Class V-A.

## PROCEDURE FOLLOWED BY APPEAL BOARD

1626.25 *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall

be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant, together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.